FILE COPY

In the Supreme Court of the United States

October Term, 1919.

SILVER KING COALITION MINES COMPANY, a Corporation,
Petitioner,
vs.
CONKLING MINING COMPANY, a Corporation,
Respondent.

158
No. 4[illegible]

RESPONDENT'S MOTION TO VACATE ORDER ALLOWING WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF SAME.

E. B. CRITCHLOW,
W. D. McHUGH,
W. W. RAY,
WM. H. KING,
Solicitors for Respondent.

No. 489.

In the Supreme Court of the United States

October Term, 1919.

SILVER KING COALITION MINES COMPANY, a Corporation,
Petitioner,
vs.
CONKLING MINING COMPANY, a Corporation,
Respondent.

To Silver King Coalition Mines Company, Petitioner, and to W. H. Dickson, A. C. Ellis, Jr., C. H. Lindley, R. G. Lucas, Thomas Marioneaux, and Wm. C. Prentiss, its Solicitors:

Please take notice, that on Monday, the 31st day of May, 1920, at the opening of court or as soon thereafter as counsel can be heard, the undersigned will move this Honorable Court to vacate and set aside its order herein made on the 20th day of October, 1919, allowing the issuance of a writ of certiorari to the Circuit Court of Appeals of the Eighth Circuit. Said motion will be made upon the files of this cause now in this court, and upon

the verified petition, a copy of which (lacking the verification of William H. King) is herewith served upon you.

CONKLING MINING COMPANY,
Respondent.

By E. B. CRITCHLOW,
W. D. McHUGH,
WM. W. RAY,
WM. H. KING,
Its Solicitors.

Copy of the foregoing served on us this 17th day of May, 1920, at Salt Lake City.

W. H. DICKSON,
A. C. ELLIS, JR.,
R. G. LUCAS,
THOMAS MARIONEAUX,
Solicitors for Petitioner.

Copy of the foregoing received by me this ——— day of May, 1920, at Washington, D. C.

MOTION.

Now comes Conkling Mining Company, a corporation, by its solicitors, and shows to this court as follows:

That the Conkling Mining Company is the respondent to that certain petition heretofore filed in this court and presented on the 6th day of October, 1919, wherein Silver King Coalition Mines Company prayed the issuance of a writ of certiorari from this court to the Circuit

Court of Appeals of the Eighth Circuit in a suit wherein said petitioner was the appellant and the Conkling Mining Company was the appellee. Notice of the intention of said petitioner to move for the allowance of said writ upon said last named date was served upon the Conkling Mining Company as respondent within the period allowed by law, and pursuant to Rule 37 of this court, what purported to be a copy of the transcript of the record, together with a full and extended brief in behalf of petitioner was also served upon the solicitors of Conkling Mining Company.

As will more fully appear from the files and record herein, the counsel of record of petitioner Silver King Coalition Mines Company, were the following named members of the bar of this court, and these only, to-wit:

W. H. Dickson, Esquire,
A. C. Ellis, Jr., Esquire,
Curtis H. Lindley, Esquire,
R. G. Lucas, Esquire, and
Thomas Marioneaux, Esquire.

All of the foregoing are residents of Salt Lake City, Utah, excepting only Curtis H. Lindley, Esquire, who is a resident of San Francisco, California, and who has never at any time actively participated in the conduct of this litigation.

The brief so served upon the respondent's solicitors in August, 1919, was an elaborate brief, being in large part a reprint of briefs theretofore served on three several submissions of the issues in this cause to the Eighth Circuit Court of Appeals and to this court upon a former application for writ of certiorari.

Since 1912, the undersigned, E. B. Critchlow of Salt Lake City, Utah, has had and now has charge of this litigation in behalf of Conkling Mining Company, and service of all papers and briefs in this cause has been regularly made by and upon said last named solicitor, whose position and authority in said litigation has been at all times recognized by the solicitors for Silver King Coalition Mines Company, excepting as hereinafter set forth. William H. King, Esquire, was actively connected with this litigation as a solicitor for Conkling Mining Company from 1911 to 1917, when by reason of his official duties in the Senate of the United States at Washington, he retired from such participation, and there was substituted in his stead, William W. Ray of Salt Lake City, Utah, who ever since said last named date has participated with said Critchlow in the conduct of the litigation, the name of the said William H. King, however, remaining attached to the record. These facts are and at all times have been well known to the said Silver King Coalition Mines Company and its solicitors.

Upon receipt by solicitors for the respondent Conkling Mining Company, of the brief of said petitioner, Silver King Coalition Mines Company, in support of the application for the writ, a brief in behalf of the respondent was prepared and duly served and filed in this court within the time prescribed by paragraph 3 of Rule 37 of this court, to-wit, on or about 26th day of September, 1919, and on the 1st day of the October term, 1919, of this court, to-wit, October 6th, the application for the writ was made in open court as noticed.

On Saturday, the 4th day of October, 1919, there was served upon William H. King, Esquire, at his office in the Senate Building, Washington, D. C., by William C. Prentiss, a notice, of which the following is a copy, to-wit:

No. 489.

"IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1919.

SILVER KING COALITION MINES CO.,
Petitioner,

vs.

CONKLING MINING COMPANY,
Respondent.

To Messrs. W. H. Dickson, A. C. Ellis, Jr., Curtis H. Lindley, R. G. Lucas and Thomas Marioneaux, Attorneys for Petitioner,

And

Messrs. E. B. Critchlow and W. D. McHugh, William H. King and W. J. Barrette, Attorneys for Respondent.

Please take notice that on Monday, October 6, 1919, at the opening of Court for the term, or so soon thereafter as counsel can be heard, I will submit the motion for leave to submit brief in the above entitled cause as *Amicus Curiae*, copy of which. with brief, is herewith inclosed.

WILLIAM C. PRENTISS."

The fact of the service of this notice upon said William H. King did not become known to any of the other solicitors of Conkling Mining Company until after the

submission in this court of the said notice and the leave granted by this court for the filing of the brief on October 6th.

The undersigned, E. B. Critchlow, was absent from the State of Utah on the 4th and 5th days of October, 1919, and upon his return on the morning of October 6, 1919, found in his mail a copy of the said notice of William C. Prentiss hereinbefore set forth, together with a copy of the brief of 45 pages therein referred to, said notice and brief having been mailed from Washington, D. C., on or about the 30th day of September, 1919, some four days before the service upon the said William H. King. This notice and brief did not come to the attention of the said E. B. Critchlow until about the hour when the same was to be submitted in this court, and prior to its submission said solicitor had no time or opportunity either to examine the same or the circumstances of its submission, or to take any action in respect thereto. No copy of said notice or brief was sent to or served upon said Solicitor, W. W. Ray, nor did he have any notice or knowledge of the said application of said Prentiss until after its submission in this court. The said William C. Prentiss above named is and during all the times herein mentioned was as the undersigned aver, upon their information and belief, a member of the bar of this court.

For some considerable time after the application was made by the said William C. Prentiss and the leave granted by this Court to him to appear as Amicus Curiae, the respondent Conkling Mining Company and its solicitors had no sufficient reason to suspect that the appear-

ance of said Prentiss before this court was sought and obtained otherwise than regularly and in good faith. Later, because of suspicions aroused by rumors circulating at Salt Lake City, the undersigned and its solicitors conducted an investigation to ascertain the facts, and as a result of said investigation are at this time able to state positively, and do charge and show to this Court that said appearance of said William C. Prentiss was made, and leave to file said brief was obtained by said Prentiss and by the Silver King Coalition Mines Company, petitioner, by fraud and deceit practiced upon this Court and upon the respondent and its solicitors in the following manner, to-wit:

In the latter part of August, 1919, and about the date when the brief of the petitioner accompanying its application for the writ of certiorari was served upon the solicitors for respondent, Mr. W. Montague Ferry, then and now the Managing Director of Silver King Coalition Mines Company, and Mr. A. C. Ellis, Jr., one of the solicitors of ~~respondent~~ Silver King Coalition Mines Company, together went to Washington, D. C., in behalf of and at the expense of said Silver King Coalition Mines Company, and about the last of August, 1919, employed said William C. Prentiss of Washington, D. C., as counsel for Silver King Coalition Mines Company, and then and there on behalf of said company paid or agreed to pay him for his services rendered, and to be rendered in this litigation. That the undertaking of the said Prentiss in accepting said employment, and the understanding between him and the said peti-

tioner and its counsel, A. C. Ellis, Jr., was that said William C. Prentiss was to use every effort possible to get a review of the case of Silver King Coalition Mines Company against Conkling Mining Company, to-wit, this cause, in the Supreme Court of the United States. That pursuant to said employment and in order to secure this result it was then and there agreed and arranged between the said Ellis, the said Ferry and the said Prentiss, that the said Prentiss, instead of appearing openly upon the record as counsel for petitioner, and as such, presenting an argument as its retained counsel, should pose in this litigation only as a friend of the Court, and as not employed by or representing either party to the cause, and that as amicus curiae, he should represent to the Court that the questions involved in the litigation were of great and general interest and concern, and that a review by this Court of the ruling of the Circuit Court of Appeals is essential to the quieting of titles disturbed by said rulings and to the settling of the law upon questions decided by the said Circuit Court of Appeals, and that taking advantage of permission obtained by him in the capacity assumed, he should present to this Court a brief in such manner and under such circumstances as that the solicitors for respondent would have no opportunity either to make reply or to question his right to appear. In furtherance of said design, and for the purpose of better concealing from the Court and opposing counsel the true relations borne by said Prentiss to this litigation, they concealed from the respondent and its solicitors, the employment of said Prentiss and the fact that any conference

whatever was had with him, and caused the said notice of motion hereinbefore set forth to be served upon the eve of the application to be made to this Court, and caused the notice of said motion to be so worded as to appear to be addressed to and served upon both counsel for the petitioner, Silver King Coalition Mines Company and counsel for the respondent, notwithstanding the fact that said Prentiss and the said counsel of record of petitioner were so acting as aforesaid by secret agreement in the employ of the petitioner, Silver King Coalition Mines Company; and further caused the motion herein as more fully appears from the records of this court to be worded as follows, to-wit:

"MOTION.

Comes now William C. Prentiss and showing to the Court that the questions of boundaries of a mining claim patented between 1891 and 1904 and extralateral right on a cross-vein, involved in said cause, are of great and general interest and concern, and that review by this Court of the rulings of the Circuit Court of Appeals is essential to the quieting of titles disturbed by such rulings and to the settling of the law as to extralateral right on a cross-vein, moves the Court for leave to submit, as amicus curiae, the accompanying brief on said questions.

WILLIAM C. PRENTISS.

Washington, D. C. September 24, 1919."

That thereby the respondent and its solicitors were placed in a situation where they had no adequate means of informing themselves as to the tenor and importance of the brief tendered this Court, and had no adequate opportunity of objecting to the filing at the time and under the circumstances, of a brief and argument which was in

fact a brief of petitioner's counsel, and which brief under the rule of this Court should have been served upon respondent's counsel not less than three weeks prior to October 6, 1919.

Wherefore, the undersigned represent and respectfully show to this Honorable Court that not only has the conduct of petitioner and its solicitors as above set forth operated to prejudice the respondent Conkling Mining Company and its counsel by depriving it of a substantial right guaranteed by the rules of this Court, to-wit, the right to ample time in which to answer any brief or argument submitted by the adverse party, but that the chicane, trickery and device conceived and carried out by the petitioner and its counsel, including the said William C. Prentiss, is highly contemptuous, and if the same be tolerated and shall remain without rebuke by this Court, the administration of justice will be brought into discredit and disrepute. The undersigned respectfully submit that if counsel may, under false pretense, intervene to put before this Court briefs and arguments dignified as impartial and in the interest of public justice, when in truth and fact such presentations are the more partisan in that they are in false guise, this Court will finally be forced to the position that no counsel can be relied upon by this Court as its friend excepting only such as are designated by the Court and appointed of its own motion.

And your petitioner, Conkling Mining Company, with whom join the undersigned, its solicitors, as members of the bar of this Court, prays the Court to take cognizance of the matters and things herein set forth, and

since the petitioner corporation cannot otherwise be adequately dealt with, or the rights of the respondent adequately protected, that the order of this Court, allowing the writ of certiorari to the Eighth Circuit Court of Appeals heretofore made on the 20th day of October, 1919, for the procurement of which writ the said chicanery and deceit were practiced, be vacated, set aside and held for naught.

The undersigned solicitors further show that as to the material matters herein set forth, not within the personal knowledge of the solicitors who verify this petition, their information is derived from sworn testimony given by said W. Montague Ferry, Managing Director of Silver King Coalition Mines Company, in a proceeding entitled in this same cause in the United States District Court for the District of Utah on April 27, 1920, in which proceeding was in question the whereabouts of certain exhibits in this cause supposed to be lost or misplaced, counsel for both petitioner and respondent appearing. A true copy of the stenographic report of the acting official reporter of said court duly certified, is attached hereto, marked "Exhibit A."

Respectfully submitted,

CONKLING MINING COMPANY,
Respondent,

By PIERCE, CRITCHLOW & BARRETTE,
Its Solicitors.

E. B. CRITCHLOW,
WM W. RAY,
W. D. MCHUGH,
W. H. KING,
Solicitors for Conkling Mining Company.

STATE OF UTAH,
COUNTY OF SALT LAKE. } ss.

E. B. Critchlow and William W. Ray, being each sworn, severally depose and say: they have read and know the contents of the foregoing petition; the same is true of their own knowledge excepting as to the facts indicated as being alleged upon their information, and as to these facts they believe the same to be true.

E. B. CRITCHLOW,
WM. W. RAY.

Subscribed and sworn to before me this 17th day of May, A. D. 1920.

JOEL NIBLEY,
Notary Public.

My commission expires February 4, 1923.

DISTRICT OF COLUMBIA,
CITY OF WASHINGTON, } ss.

William H. King, being first duly sworn, deposes and says: I have read and know the contents of the foregoing petition; the same is true of my own knowlege except as to the facts indicated as being alleged upon information, and as to these facts I believe the same to be true.

Subscribed and sworn to before me this ..... day of....., A. D. 1920.

.....
Notary Public.

My commission expires ....

EXHIBIT "A."

W. Mont Ferry, called and sworn, testifies as follows:

CROSS-EXAMINATION BY MR. CRITCHLOW.

Q. Mr. Ferry, you are the managing director of the Silver King Coalition Mines Company?

A. I am.

Q. How long have you been such?

A. About a year.

Q. You have made an affidavit in this cause in this hearing which has been read. I believe amongst other things in the affidavit, you have stated that it had been stated to you that certain papers, enumerating them, in Mr. Christy's affidavit, had been lost or mislaid, and you therefore were requested to search for them. Who stated to you the exhibits had been lost or mislaid?

A. My counsel.

Q. Which counsel?

A. I think it was either Mr. Lucas or Mr. Adamson, or possibly Judge Marioneaux; I am not certain which.

Q. Had you not seen any of these exhibits yourself?

A. No.

Q. Did you not, or one of your counsel, have any of those exhibits in your possession last fall?

A. Not to my knowledge.

Q. Did you go with one of your counsel to Washington last September?

A. I did.

Q. With which counsel?

A. Adrian C. Ellis.

Q. Of the former firm of Dickson, Ellis & Lucas?

A. Yes.

Q. When were you there, Mr. Ferry?

A. I think the very last part of August.

Q. Were you not there during a good part of September as well?

A. No.

Q. Were you there during the time Mr. Ellis was there?

A. Yes.

Q. Did you also visit and counsel with other attorneys for the Silver King Coalition Mines Company down there?

A. Yes.

MR. ADAMSON: I object, if your Honor please.

THE COURT: That is preliminary.

Q. Who were they, Mr. Ferry?

A. There was Mr. Prentiss.

Q. Who else?

A. And Judge Covington.

Q. Did you take with you any of the exhibits at that time and exhibit to counsel?

A. I did not.

Q. Did Mr. Ellis have any of the exhibits with him?

A. He did not.

Q. Did you go by way of St. Louis to Washington?

A. No.

Q. Did you have any copy, or what purported to be copies, of exhibits that time?

A. No.

Q. When did you first see Mr. Prentiss down there?

A. I could not tell you the date.

Q. He was employed by you for the purpose of writing a brief in this case, was he not?

A. He was employed by us.

Q. At what time?

A. I could not give you the date.

Q. About when?

A. Soon after we reached there.

Q. Mr. William C. Prentiss?

A. Yes.

Q. And while you were there he wrote up a brief, did he not?

A. I fancy so, I don't know.

Q. You had it printed, did you not?

A. Oh, yes; I had it soon after I got back.

Q. And paid for it—Silver King Coalition Mines Company paid for it?

A. For what?

Q. For the printing of the brief?

A. I really don't recall; I presume it did.

Q. Anyhow, paid him for his services?

A. Certainly.

Q. You are familiar with that brief, are you not?

A. I have read it.

Q. Do you recognize this which I hand to you as the copy of the brief which was filed by him?

A. I would hardly recognize it; I assume it is the same thing, though.

(Brief marked Plaintiff's Exhibit XZ.)

Q. In the preparation of this brief, Mr. Ferry, do you not recognize the fact that Mr. Prentiss had before him certain exhibits at that time, or are you unable to say about that?

A. I have no—I don't know, Mr. Critchlow. I think, Mr. Critchlow, that one of the MacVichie map reports may have gone with it, and there were millions of those, more or less, I think probably, during the record of the case.

Q. You employed him, did you not, for the express purpose of writing that brief?

A. No.

Q. You and Mr. Ellis?

A. No.

Q. What other purpose did he have; for what other purpose was he employed?

A. He was employed to give us counsel in respect to the purposes for which we were there.

Q. Purposes for which you were there were what?

A. To ascertain the necessary steps and seek advice respecting the possibility of having a Supreme Court review of this case.

Q. Did you also employ any other counsel there?

A. None except those which I have mentioned.

Q. Who?

A. Covington.

Q. For what purpose was he employed?

A. Same purpose.

Q. Did you furnish to him exhibits, or copies of exhibits in this case?

A. No.

Q. So far as you know none of the original exhibits were taken there?

A. I told you, Mr. Critchlow, I did not take any with me at all.

Q. Did Mr. Ellis?

A. So far as I know, Mr. Ellis did not.

Q. Did you and Mr. Ellis, or either of you, pay the expenses of these counsel directly, or were they certified to your company?

A. I don't understand you.

Q. Were the fees and expenses of these counsel you have named paid directly by you and Mr. Ellis, or either of you, or were they certified to the secretary and paid by the company?

A. They were paid by the company.

Q. Later?

A. Yes.

Q. Did you also employ any other counsel than the ones you have mentioned, Mr. Prentiss and Mr. Covington?

A. No.

Q. Did you, yourself, go to see the Department of the Interior?

A. No.

Q. Or any of its officers—who did that, do you know?

A. I don't know.

Q. Do you know whether Mr. Covington or Mr. Prentiss, or either of them, prepared another brief or suggestion which was filed in the Supreme Court of the United States, a copy of which I show you, and which purports to be signed by Alexander C. King, Solicitor General, and printed at the government printing office?

A. No, I don't recall having seen that before, Mr. Critchlow.

Q. Do you not know as a matter of fact, that either Mr. Prentiss or Mr. Covington prepared this, and procured the Solicitor General of the United States to sign it as prepared?

A. No.

Q. You don't know that?

A. I do not.

Q. Do you know the fact to be otherwise?

A. I don't know anything about it.

Q. Was it a part of their employment that they should procure an officer of the Department of Justice, or of the Department of the Interior to intervene in this case?

A. I don't understand.

Q. Was it a part of the employment of either Mr. Prentiss or Mr. Covington that they should procure an officer of the Department of Justice to intervene in this case in the Supreme Court of the United States?

A. No.

Q. You knew, did you not, Mr. Ferry, that they were

to procure the intervention of the United States Interior Department if it could be done?

A. I don't like that word procure, Mr. Critchlow.

Q. Well, induce?

A. No, I don't like that either.

Q. What word would you prefer?

A. I would prefer to say they were employed to use every effort possible to get a review of this case by the Supreme Court of the United States.

Q. Including an intervention, if possible, by the Interior Department, or some officer of the Department of Justice?

A. Yes.

Q. And as to whether or not in doing that they prepared and laid before one of the officers a brief or a suggestion to the Supreme Court of the United States, you do not, yourself, personally know?

A. No.

Q. Who would know about that; would Mr. Ellis know?

A. I suppose Mr. Prentiss would.

Q. As a matter of fact, yourself and Mr. Ellis in connection with Mr. Prentiss agreed, did you not, that in every possible way information of the employment of Mr. Prentiss and of the proposed intervention by the Interior Department or the Department of Justice should be kept from the attorney or counsel for the Conkling Mining Company?

A. No.

Q. That is not true?

MR. ADAMSON: If your Honor please, I do not see what this has to do with the substitution of copies of exhibits on the motion that is before the Court, and I object to it.

MR. CRITCHLOW: We think it has a great deal to do with it, your Honor please.

MR. ADAMSON: Of course, if he is going to connect it up, it is a different proposition, but I would like to have him state he is going to connect it up, and how.

THE COURT: We are not trying the case. If you claim anything for it, you may proceed.

MR. CRITCHLOW: I claim this for it, your Honor please. For eight years this case has been dragging along, and we come now to the point where there are very important exhibits missing, and counsel whom we never knew and never attached themselves to the record came into this case, and we are entitled to know what their connection has been with these exhibits, if any.

MR. RAY: They have counsel making affidavits to these records.

MR. CRITCHLOW: There are a good many things in these affidavits now known to be incorrect. I mean in the affidavits that are already on file here.

THE COURT: But the fact that the United States Department of the Interior chose to intervene—perfectly proper and legal.

MR. CRITCHLOW: Perhaps, I will say that much, perhaps it was perfectly proper.

THE COURT: That is, so far as this court is concerned.

Q. Were you there in Washington at the time when the brief of Mr. Prentiss was filed?

A. No.

Q. It bears date, I will call your attention, on the 24th day of September, were you there at that time?

A. No.

Q. You had left before that, had you?

A. Yes.

Q. Were you there when the suggestions of the United States relative to the granting of a writ of certiorari was filed?

A. No.

Q. You don't know when they were filed?

A. I do not.

Q. Of your own knowledge?

A. No.

Q. How long before the 24th day of September was it, Mr. Ferry, as nearly as you can place it, when you employed Mr. William C. Prentiss?

A. My very distinct recollection is that I was absent from town less than two weeks, and that I reached here either the first—upon my return I reached home either the first or second day of September.

Q. So that according to your recollection he was employed in August?

A. He was employed the latter part of August.

Q. Is that the same Prentiss that was formerly of the firm of Prentiss & Clark?

A. I don't know.

Q. Who introduced you to Mr. Prentiss—Mr. Ellis?

A. Yes.

Q. And who introduced you to Mr. Covington?

A. Mr. Prentiss.

Q. You had not met Mr. Covington before you employed Mr. Prentiss?

A. I never had.

Q. He was employed after, was he?

A. At the same time.

Q. Were they employed together?

A. No.

Q. As a joint employment, or employed separately?

A. Separately.

Q. Are they partners, as you understood it?

A. They are not.

Q. Did Mr. Covington write any brief in the case, so far as you know, or was he employed to?

A. I could not say, I am not—

Q. Simply employed to use every possible effort to get the writ allowed, is that it?

A. Mr. Critchlow, I don't know; I did not specify just exactly what his employment was to be. They were both employed as attorneys for the Silver King Coalition Mines Company in connection with this case, and I have no doubt that Mr. Covington helped preparing and in preparation of whatever papers were filed.

Q. Including the suggestions of the Solicitor General?

A. I assume he must have had something to do with that. That is what they were employed for, to give their

best attention to this matter. We did not specify any particular thing we wanted them to do.

Q. Except a general employment?

MR. ADAMSON: Your Honor please, I want to suggest here that is purely a matter of conjecture on the part of counsel and he is endeavoring to put something in the mouth of the witness, the witness don't know anything about. The idea of suggesting an outside attorney in Washington, D. C., could prepare an application of the Attorney General's office, to me seems absurd.

MR. CRITCHLOW: Supposing it was done in this case, Mr. Adamson, and was done exactly that way?

MR. ADAMSON: Mr. Ferry has said he doesn't know, but supposes may be he did. Now, that is purely supposition, and should have no bearing on this hearing at all.

MR. CRITCHLOW: That is all, Mr. Ferry. I offer in connection with the examination of the witness the Exhibit XZ.

STATE OF UTAH,
COUNTY OF SALT LAKE. } ss.

J. R. Davis, being first duly sworn, deposes and says: I am a court reporter and stenographer. On April 27, 1920, I was acting as shorthand reporter of the U. S. District Court for the District of Utah in a proceeding in the cause, Conkling Mining Company v. Silver King Coalition Mines Company, before Hon. T. D. Johnson, Judge.

The above and foregoing is a full, true and correct copy (except as to the exhibits therein noted) of the tes-

timony given by W. Mont. Ferry as the same appears in the shorthand notes taken by me at the time.

J. R. Davis.

Subscribed and sworn to before me this 17th day of May, A. D. 1920.

(Seal.) F. B. Critchlow,
Notary Public.

My commission expires March 4, 1924.

INDEX

CASES CITED

No. 489.

In the Supreme Court of the United States

October Term, 1919.

SILVER KING COALITION MINES COMPANY, a Corporation,
Petitioner,
vs.
CONKLING MINING COMPANY, a Corporation,
Respondent.

BRIEF OF RESPONDENT IN SUPPORT OF MOTION TO VACATE ORDER ALLOWING WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

In January, 1908, the Conkling Mining Company filed its bill in equity in the District Court of the United States for the District of Utah against the Silver King Coalition Mines Company, its co-tenant in ownership of the Conkling lode mining claim, asking an accounting for the value of ores secretly mined and extracted by the latter company from said Conkling claim. In the almost twelve years that had elapsed since the bill was filed and prior to October 6, 1919, the cause had twice been tried before the District Court, twice had

it been before the Circuit Court of Appeals of the Eighth Circuit and twice had applications for rehearing been made to the Court of Appeals by the above named petitioner, and denied, and once had it been before this court on a petition for writ of certiorari which also had been denied. The opinions of the Circuit Court of Appeals and of this court upon these various hearings are found in 230 Fed. 553; 242 U. S. 629; 255 Fed. 740.

The final decision of the Circuit Court of Appeals (255 Fed. 740) directing the entry of judgment in favor of the respondent in the sum of $570,076.50 was handed down December 19, 1918. A rehearing having been denied, the Silver King Company for the second time petitioned this court for the issuance of a writ of certiorari and procured a stay of execution of the judgment pending the hearing on its petition. In all this protracted litigation the King Company had been represented by able counsel, and whatever might be said concerning the conduct of the company in the mining operations that led up to this and other litigation (see Silver King Coalition Mines Co. vs. Silver King Consolidated Mines Co., 204 Fed. 166-179, and Silver King Coalition Mines Company vs. Conkling Mining Company, 255 Fed. 740 at 743,) its conduct as a litigant, if dilatory, was not dishonest. But here its guise of virtue was discarded. Although in support of its petition for the writ the King Company had prepared an elaborate brief in which was presented with all the force and ingenuity of its counsel the points involved and all the arguments thereon which they had so often urged, it evidently realized that

there was nothing contained therein which would move this court to the exercise of its discretionary power to grant the writ. For the purpose of manufacturing a record therefore from which it should appear that the questions involved were of great and unusual *public* interest and had been erroneously decided to the detriment of many thousands of other mine owners, said company devised and carried out the following scheme.

One William C. Prentiss, a member of the bar of this court, was employed and paid to prepare a partisan brief in support of petitioner's various contentions. It was agreed that in this brief it should be made to appear from facts dehors the record and otherwise, that the said Prentiss was not directly interested in the litigation, but was acting merely as a friend and adviser of the court in behalf of other persons and of the public in general, who, as it was to be alleged, had been injuriously affected by the decision below. In order to impose this deception on the court, it was agreed that said brief was to be filed by Prentiss individually as *amicus curiae* and, by prearrangement with the petitioner, a copy of the brief so prepared was to be served upon petitioner's counsel as though strangers to the proceeding. It was further arranged that in order that respondent might have no opportunity of replying to said brief or of objecting to the filing of it or of inquiring into the occasion for it, all information concerning it was to be withheld from the respondent until the last possible moment prior to the presentation of petitioner's motion, for the writ, when said brief together with a motion by said Prentiss for

leave to file the same as *amicus curiae* was to be served at the same time upon respondent's counsel in various parts of the country. The above scheme was devised in August, 1919, and was thereafter carried out. The brief as prepared is dated Washington, D. C., September 24, 1919. In pursuance of the scheme Prentiss concealed from counsel for the respondent his intention of appearing as friend of the court and withheld his brief until about September 30th, when he mailed one copy to counsel for respondent at Salt Lake City, so timed that it could not and did not arrive until Saturday, the 4th day of October, 1919. No brief was ever mailed to Mr. Ray and, as a matter of fact, this one which was sent to Salt Lake was not received by counsel known to be in charge of the case until October 6th, the day the petition was presented. It was not until four days after the mailing of this brief that Senator King, the most accessible of respondent's counsel, received at his office in the Senate building at Washington, a copy of said brief and motion. Respondent's counsel had hardly time to read the brief, to say nothing of answering it, inquiring into the occasion for it or objecting to its being filed.

On Monday, October 6, 1919, the same day upon which the petition for the writ was presented, Mr. Prentiss also presented his motion for leave to file his brief as *amicus curiae*, which motion was granted. Thereafter on October 20, 1919, upon the record so manufactured and presented to it, an order was made by this court granting petitioner's prayer for the issuance of the writ.

Subsequently, by rumors current in Salt Lake City,

respondent's suspicions were aroused as to the genuineness of Prentiss' appearance. These suspicions were confirmed on April 27, 1920, when W. Montague Ferry, the managing director of the King Company, gave the testimony which appears as "Exhibit A" to this motion.

Respondent now makes this motion, asking that the court vacate and set aside its order of October 20, 1919, which was based upon the false and fabricated record thus presented to it.

I.

Wm. C. Prentiss as Amicus Curiae.

We recognize that it is not necessary to discuss in this court the function of an *amicus curiae*. Etymologically the words define themselves. The friend of the court appears as a stranger to the litigation at bar, having no interest in its result save as the principles involved may affect himself or the public, to advise the court upon matters of fact not disclosed by the record or upon some doubtful question of law. (Cent. Dict. *sub nom.;* Ency. Brit. *sub. tit.*) Courts sit to listen to those appearing as parties, not to strangers to the proceeding. One may not lightly or upon slight occasion obtrude himself as a friend of the court to venture suggestions in matters not immediately concerning him. The character assumed partakes of the dignity of the tribunal in which he appears, and his representations and arguments are heeded because of the standing which he claims for himself. The friend of the court ordinarily is a member of the bar whose representations, express and implied, are

guaranteed by his oath of admission to demean himself uprightly as an officer of the court.

Mr. Prentiss sedulously concealed from opposing counsel and from this court the fact that at the time he moved this court to be permitted to advise as its friend he had in his pocket the fee paid him by one of the parties. There was a suppressio veri and a suggestio falsi as well in putting forward, under the guise of the argument of an *amicus curiae*, a brief which was but the partisan presentation of retained counsel. This brief travels far afield outside the record made by the parties to this cause, into matters which respondent could have no opportunity to examine or refute. It contains matter relevant and irrelevant which, as *amicus curiae*, he possibly might with propriety bring to the attention of the court had he made fair use of the material.

Lord Eldon in his Anecdote Book, referring to a *retained advocate*, comments upon this phase of professional ethics, as follows:

> "I have understood that Dr. Johnson's statement was to this effect:—that as it was the duty of counsel to give information to the court, he ought to state facts accurately, to quote cases accurately, to misrepresent nothing with respect either to facts or cases, and having accurately stated facts and quoted cases, he was at liberty in conscience to reason upon them to the very best of his powers and abilities; and as the law supposed the judge to be an abler man, and an abler lawyer than the counsel, the judge was to reason better upon the facts and the cases, than the counsel; and, proceeding in this way, the counsel did nothing wrong in thus gaining the cause for his

client. But it may be questioned whether even this can be supported."

1 Twiss Life of Eldon, 107.

How much more strict must be the obligations of a *friend of the court,* and what a marked distinction between the conduct thus required and the methods of Mr. Prentiss!

II.

Petitioner's conduct was expressly designed to result and did result in prejudicing the respondent and in depriving it of the rights granted and guaranteed to it by the customs, rules and practices of this court.

It cannot be denied that the brief submitted by Mr. Prentiss, although garbed in the cloak of impartial good faith, was in truth and in fact the partisan exposition of counsel expressly employed and paid by the litigant whose interest and prejudice he deceitfully disavowed. Under the rules of this court the respondent as a matter of right was given 21 days in which to reply to such an exposition. In the present case not only was it deprived of the time allowed it by the rule, but in pursuance of petitioner's preconceived design, the brief although prepared and ready apparently as early as September 24, 1919, was not served until October 4th, being then simultaneously delivered to counsel in various parts of the country at a time when it was impossible to make any reply whatever thereto.

Had Prentiss' brief been fair and impartial, being deprived of this right to answer, it would have been of little consequence, but such was not the case. He was employed

"to do everything within his power" to obtain a review. The questions were presented strictly from the client's viewpoint, and all matters opposed to his client's interest were carefully suppressed. He took advantage of his disguise to import into the case matters foreign to the record, but carefully refrained from calling to the court's attention to those other matters which made his importations of no moment. A discussion of the merits of the case has no place upon this motion, yet as illustrative of the character of this partisan brief it is not amiss to call the court's attention to the fact that the letters passing beween the Commissioner of the General Land Office and the Acting Secretary of the Interior relied upon so strongly by petitioner in it, (being Exhibits B, C, D and E of the appendix thereto) refer to the *amended* statute which had but a few months before been passed (R. C., Sec. 2327, Act of April 28, 1904,) and were concerned with the changes in the regulations *necessitated* by said *amendment.* This is clearly shown by the letter of the Commissoner of July 19, 1904, *designedly omitted* by Mr. Prentiss from his compilation of the correspondence. This letter is as follows:

N-1

H. G. P.
J. V. W.

DEPARTMENT OF THE INTERIOR,
General Land Office,
Washington, D. C.,

N. July 19, 1904.
H. G. P.

The Honorable, the Secretary of the Interior.

SIR: I have the honor to submit the following proposed amendment of paragraph one hundred and forty-seven of the Mining Regulations, approved December 18, 1903. The amendment is necessary to conform, in both letter and spirit, with the provisions of the act of Congress approved April 28, 1904, (33 Sta., 545), entitled "An Act to amend Section 2327 of the Revised Statutes, relating to lands." The act relates to patented mining claims only, but it is clear that it must be made to apply to all *approved* mineral surveys, otherwise there would be only partial relief to the situation.

The amendment would meet all the requirements for information and instruction under said act. In working under the proposed amendment, there would be the right of protest by parties who may believe their rights are being interfered with by its application to their claims whether patented or not, and the right of appeal from action by the surveyor general and of this office and cases will probably arise where a hearing will be necessary to determine the true locus of the claim, but all this is provided for by the rules of practice and regulations governing contests.

A further question arises in the application of the *new rule*, and that is the segregations with

amended township plats required by paragraph 37 of the Mining Regulations. *It is apparent that if the locus of mineral surveys is hereafter to be determined by the monuments on the ground,* (italics ours) and the lottings of fractional agricultural tracts covered by these mineral surveys determined as heretofore by the *tie line,* there will be confusion to agricultural claimants. Attention is now called to this feature and the matter is being considered with a view of proposing at an early date an amendment to said paragraph thirty-seven.

Paragraph 147 of the Mining Regulations approved, December 13, 1903, reads:

147. If an official survey has been made within a reasonable distance in the vicinity, there should be a connecting line run to some corner of the same, and in like mannr all conflicting surveys and claims should be so connected, and the corner with which the connection is made described. In survey of contiguous locations which are part of a consolidated claim, where corners are common, bearings should be mentioned but once.

Proposed amendment to read as follows:

147. If an official survey has been made within a reasonable distance in the vicinity, there should be a connecting line run to some corner of same. And all conflicting surveyed claims should be connected and the corner with which the connection is made described, and the connecting line and all lines describing the conflict shall be the 'lines actually marked, defined, and established upon the ground' by monuments substantially within the requirements under the law and official regulations and corresponding to the description thereof in the approved survey, if such there be, and the mineral surveyor should plainly and specifically state in his re-

turn whether such monuments are found by him and the conflict described accordingly, or whether none such are found and the conflict, therefore, described from the connecting line to a corner of the public survey or a United States mineral monument. In survey of contiguous locations which are part of a consolidated claim, where corners are common, bearings should be mentioned but once.

Very respectfully,

W. A. RICHARDS,
Commissioner.

The statute (Sec. 2327) in force at the time the patent here involved was granted and until the amendment of April, 1904, provided: "The Surveyor General in extending surveys shall adjust the same to the boundaries of such patented claims according to the plat or description thereof." *This statute is not even cited in the Prentiss brief.* When it is considered in connection with the *omitted letter* it is evident that the Land Office's construction of the statute had been exactly contrary to petitioner's contention. There could have been no purpose in setting forth this *partial* file of correspondence save to mislead the court.

In this connection we might also call the court's attention to the language appearing on page 30 of the brief of the so-called *amicus curiae.* From this the petitioner would have the court believe that the original positions of the official monuments were conclusively established by practical uncontroverted evidence. Such is not the fact. The petitioner has here attempted to persuade this court by the averment of a supposedly disinterested critic of the certain existence of disputed facts upon this issue.

The Court of Appeals found the facts as follows: (230 Fed. 556-561.)

> "The evidence produced to sustain it consisted of the field notes of the survey of the claim which were made on November 1, 1889, * * * and the testimony of witnesses that they found these stakes years after the survey 1,364.5 feet distant from the easterly line of the claim. In addition to this testimony a large number of plats and field notes of other claims in the vicinity of the Conkling claim, and some other evidence, was introduced, but the testimony that these stakes were found by two or three surveyors, sometimes lying on the ground and sometimes standing in a mound of stones about 1,364.5 feet distant from the easterly line of the claim, is the most substantial and persuasive evidence that they were originally placed by the surveyor at about that distance from the easterly line.
>
> This testimony and all the other evidence upon this subject has been carefully read more than once and deliberately considered in view of the established rule that the finding of the chancellor should not be disturbed, unless it clearly appears that he has made a serious mistake of fact or has fallen into some plain error of law. * * *
>
> And finally the proof that the westerly posts of the official survey upon which this patent was granted were originally set only 1,364.5 feet distant from the easterly line of the claim is not of that certain and satisfactory character which would warrant a court in avoiding, so many years, after the issue of the patent, the grant which the United States clearly made. * * *"

Had the *amicus curiae* been as zealous in presenting to this court all the facts and records of the land office which might have had a bearing upon the whole case as he was in presenting those only which appear to support

his client, he would have called attention to the fact that it was claimed by the respondent to be a common happening in the mountainous country in which this claim was located for posts to be obliterated by snows and other means, and that it was also common practice for mineral surveyors to re-establish such lost posts in places where they thought they ought to be. As a convincing illustration of these facts, as a true friend of the court, he should have called its attention to another record of the Land Department, to-wit, the field notes of the Show-Me lode. In these notes Mr. C. P. Brooks, the surveyor upon whose testimony petitioner relies, recited that in the survey of this *one* claim he had re-established for prior claims *four such lost posts* in the positions where he thought they ought to stand.

The brief of Prentiss was also intended to mislead this court into believing that there are 20,000 patents issued under the law between 1891 and 1904 and that the titles held under these are disturbed by the ruling of the Circuit Court of Appeals. Whether or not his unsworn statement as to the number of patents be true or otherwise, we have taken no pains to verify. It is immaterial in any event because of the fact, which must be obvious upon reflection, that so far from disturbing these titles held under the law and the practice of the Land Department prior to 1904, the ruling of the Circuit Court of Appeals sets these titles at rest. Such ruling is not only in accordance with established precedent (see Commissioner's letter of July 19th above), but even if otherwise, its effect is precisely contrary to that insinuated by

Mr. Prentiss on pp. 1 and 28 of his brief. For, if the government must in disposing of its mineral land, as the petitioner claims, in each of these 20,000 instances investigate to ascertain where the posts were originally set, disregarding the plain calls in the patent, it must at intolerable expense to itself and subsequent appropriators keep a corps of engineers in the field running lines and taking testimony as to matters all of which occurred from sixteen to thirty years ago.

This suggestion of Prentiss so made as that respondent had no opportunity to answer it, is but another instance of his unfair partisan zeal operating to the disadvantage of respondent.

III.

The Fraud Upon the Court.

It is not necessary to call this Court's attention to the character or function of the writ of certiorari or to the characteristic features of a situation which will move the Court to the exercise of its discretion in granting it. It is sufficient for this motion that petitioner for the purpose of bringing itself within the rules, by the contrivance of the Prentiss' brief fabricated a record so that it should appear therefrom that the case was one of great public interest and importance. By this contrivance petitioner, although in reality appearing for itself by its paid advocate, gave to this Court an assurance of good faith, commensurate with the dignity of the tribunal whose discretion it thus sought to invoke. It represented with all the strength of such assurance that it was ap-

pearing solely as a disinterested and impartial friend and adviser upon questions in which the mining industry had a vital interest. The Court is told that there are some 20,000 mineral claims whose rights have been affected. Yet in all the twelve years of this litigation not one of said claimants has sought to intervene. Their rights have been jeopardized, yet the only one complaining is Mr. Prentiss, who was employed and paid for that purpose—not by any injured parties, but by the litigant who is asking the Court for relief. That such conduct is a fraud and an imposition on the Court needs no argument or citation of authority.

IV.

The Relief Sought by Respondent.

We respectfully submit that the relief sought by this motion—the vacation of the order of October 20, 1919, allowing the writ of certiorari—should be granted. In this manner only can the wrong and damage suffered by the respondent be rectified. A delay of more than seven months has already been suffered. The annoyance and expense of a protracted investigation of the facts and of this application to the Court has been incurred. In no other manner can this Court redress the wrong to respondent. In no other manner can the Court adequately vindicate its own dignity or punish the party who has thus sought to impose upon it. We rely upon the settled principle that where a party has by fraudulent conduct sought to gain an advantage in a cause the Court will not inquire into the merits of the matter involved, but will

deny to the guilty party all the advantage he sought to obtain.

> "Equity imperatively demands of suitors in its courts fair dealing and righteous conduct with reference to the matters concerning which they seek relief. He who has acted in bad faith, resorted to trickery and deception, or been guilty of fraud, injustice, or unfairness will appeal in vain to a court of conscience, even though in his wrongdoing he may have kept himself strictly 'within the law.'"
>
> Judge Sessions in Weegham v. Killefer, 215 Fed. 168 at 171.

> "A suit in equity is an appeal for relief to the moral sense of the chancellor. A court of equity is the forum of conscience. Nothing but good faith, the obligations of duty, and reasonable diligence will move it to action. Its decree is the exercise of discretion, not of an arbitrary and fickle will, but of a wise judicial discretion, controlled and guided by the established rules and principles of equity jurisprudence. One of the most salutary of these principles is expressed by the maxims, 'He who comes into a court of equity must come with clean hands,' and 'He who has done iniquity cannot have equity.' A court of equity will leave to his remedy at law—will refuse to interfere to grant relief to—one who, in the matter or transaction concerning which he seeks its aid, has been wanting in good faith, honesty, or righteous dealing. While in a proper case it acts upon the conscience of a defendant, to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud, or any unconscionable act in the transaction which forms the basis of his suit."
>
> Judge Sanborn in Michigan Pipe Co. v. Vermont Ditch Co., 111 Fed. 284 at p. 287.

> "A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity."
>
> Justice Brewer in Deweese v. Reinhard, 165 U. S. 386.

If for any reason the denial of the writ not be now announced and it shall be urged in the future that the petition for the writ is still before the court to be acted upon, we have no doubt that its action will be guided by the precedent of Florida Cent. R. R. Co. vs. Schulte, 100 U. S. 644, and by the principles above expressed.

V.

Results of a Failure to Grant the Relief.

By way of urging still further the granting of the relief asked by respondent we believe it entirely proper to consider the inevitable result of a failure to vacate the order as asked.

Every Court, upon an application in proper form, is ready to listen to one who offers his services as a friend of the Court. When such a tender is made it would be an ungracious act to refuse the assistance or refuse to listen to pertinent facts suggested. It is to the credit of the bar that no case like the one here presented can be found wherein deceit upon Court or parties has been attempted. It is a credit to the courts that no case can be found in which a Court has refused arbitrarily or upon insufficient reasons to listen with patience to an

amicus curiae. But should this case pass without rebuke neither this or any Federal Court will know at any future time in what capacity one styling himself a friend of the Court is appearing in litigation to which he is not by the record attached. It could not be known from the form of the appearance, and it would be futile to inquire whether or not the self-styled amicus were not a paid emissary of one of the parties litigant masquerading as a friend of the Court, and therefore by the same token a friend of both. Suspicions would be constantly engendered unworthy the high character which members of the bar have always borne, leading to the enactment of new and complicated rules as to the notice to be given of motions for leave to appear. Furthermore, worst of all, as suggested in the motion, it must inevitably happen that this and every Court would view with suspicion every such friendly intervention and in the end would repose confidence only in such *amici curiae* as might be designated by the Court to act as such. Disinterested high-minded zeal for the proper administration of the law would in the end be cheaply bartered for the specious partisanship of a paid solicitor.

VI.

Character as a Defense.

The respondent at the date of this brief has no intimation as to the grounds upon which, if at all, this motion will be resisted. There is but one, so far as we can conjecture, that can be urged, and that is that the Silver King Coalition Mines Company acted under the advice

of counsel and, being unlearned in the law, should not be made to suffer through their wrong doing; that it should not therefore be deprived of the opportunity heretofore granted on October 20, 1919, to bring up the record for review, but that the penalty, if any, should be visited only upon counsel. It may plead innocence and its presumably good character as a defense.

This is what was urged in the analogous case Florida Central R. R. Co. v. Schulte, 100 U. S. 644, when the privilege of filing a new supersedeas bond was sought, but without avail.

However, the Silver King Coalition Mines Company in view of its character and consistent course of dealing with its co-tenants as established by the records in this and other Federal Courts should not have the hardihood to put forward its character or reputation for fair dealing.

In this very case the Circuit Court of Appeals has characterized it as a defaulting trustee which has negligently or recklessly mingled the property of its *cestui que trust* with its own, keeping no account thereof (255 Fed. 743), using the following language:

> "As this Court stated in Silver King Coalition Mines Co. of Nevada v. Silver King Consolidated Mining Co. of Utah, 204 Fed. 166, 180, 122 C. C. A. 402, 416, the King Company—'was a trustee for the complainant of its share of the ore it took, and of the proceeds thereof. As such trustee it violated its duty to notify its co-tenant of its entry and taking of the ore, its duty to keep the ore separate, its duty to keep an account of it and of its proceeds, and its duty promptly to account for and

pay to its co-tenant its just share of the proceeds of the ore.'"

The facts upon which the foregoing conclusion is based are summarized in the opinion of the Court (204 Fed. 179), as follows:

> "It is conceded that there is convincing evidence in this record that the defendant had the intent before it extracted any of this ore, to appropriate it all to itself; that it entered secretly, and carefully concealed its extraction and sale of ore for many years; that it mixed the ore with its own taken from other mines which it owned in severalty; that it kept no separate account of this ore, or of its proceeds; and that it caved the stope from which it extracted it so that it was difficult and expensive to ascertain the amount or value of the ore it took."

We submit that it cannot be fairly claimed in behalf of the Silver King Coalition Mines Company that its character and standing is such as to render it improbable that it was in any manner deceived or that it "would knowingly countenance or in any way participate in or suffer an attempt to impose on the Supreme Court of the United States" its own paid solicitor as a disinterested friend of that Court.

Respectfully submitted,

E. B. CRITCHLOW,
W. D. McHUGH,
W. W. RAY,
WM. H. KING,
Solicitors for Respondent.